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No. 85-2153

IN THE

Supreme Court of the United States

October Term, 1985

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Petitioner,

v.

BOSTON AND MAINE CORPORATION,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTIONS PRESENTED

1. Should this Court grant the Petition to determine whether the Court of Appeals correctly held that the Petitioner's action, based on alleged violations of the Railway Labor Act, was a collateral attack upon an Interstate Commerce Commission Order over which the District Court did not have jurisdiction?

2. Should this Court grant the Petition to determine whether the Court of Appeals erred in its application of the "obviously insubstantial" standard by holding that it was not frivolous for Boston and Maine to argue that the Unit Coal Train Agreement between the parties applied only to trains making the full run from Mechanicville to Concord?

LIST OF PARTIES

The parties to the proceedings below were the Respondent, Boston and Maine Corporation and Petitioner, the Brotherhood of Locomotive Engineers.

The following is a list of all parent, subsidiary and affiliate corporations of Boston and Maine Corporation as required by Rule 28.1 of the Supreme Court Rules:

Guilford Transportation Industries, Inc.;
Guilford Motor Express, Inc.;
Guilford Aviation Corporation;
Hudson River Estates, Inc.;
Railstar Control Technology, Inc.;

Boston and Maine Corporation;
Springfield Terminal Railway Company;
Cheshire Bridge Corporation;
The Mystic Terminal Company;
Stony Brook Railroad Corporation;
Northern Railroad;
Vermont and Massachusetts Railroad Company;
North Station Industrial Building, Inc.;
North Station Hotel Building, Inc.;
Pine Tree Corporation;
Connecticut River Valley Company, Inc.;

Delaware and Hudson Railway Company;
Albany Port Railroad Corporation;
Napierville Junction Railway Co.;
Albany and Vermont Railroad Company;
Greenwich and Johnsonville Railway Company;
Wilkes-Barre Connecting Railroad Company;
Saratoga and Schenectady Railroad Company;
The Northern New York Development Company;
Wyoming Valley Improvement Company;

Maine Central Railroad Company; and
Portland Terminal Company.

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BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
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BOSTON AND MAINE CORPORATION,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

The Respondent, Boston and Maine Corporation, respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the decision and judgment of the United States Court of Appeals for the First Circuit rendered on April 9, 1986, reported at 788 F.2d 794.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, dated April 9, 1986, is reported at 788 F.2d 794 and is reproduced in Petitioner's Appendix at 1a-14a. The opinion of the United States District Court for the District of Massachusetts, dated October 4, 1985, has

not been reported. It is reproduced in Petitioner's Appendix at 15a-19a. The decision of the Interstate Commerce Commission, dated April 26, 1985, is reproduced in Appendix A to the Cross-Petition filed by Boston and Maine Corporation at No. 86-160.

JURISDICTION

Petitioner brought this suit in the District Court of Massachusetts seeking to invoke federal jurisdiction pursuant to 28 U.S.C. §§1131, 1137 and 2201. On October 4, 1985, the District Court dismissed the suit for want of subject matter jurisdiction.

On Petitioner's appeal, the First Circuit, on April 9, 1986, affirmed the District Court's dismissal. No petition for rehearing was sought. Petitioner filed a motion for a stay of mandate on April 21, 1986, which was denied on May 2, 1986.

Respondent received a copy of the Petition for Writ of Certiorari on June 30, 1986. On July 24, 1986, Francis J. Lorson, Chief Deputy Clerk for this Honorable Court, ordered that the time for filing a Brief in Opposition to the Petition for Writ of Certiorari be extended to, and including, August 29, 1986.

On July 30, 1986, pursuant to Rule 19.5 of the Supreme Court Rules, Respondent filed a Cross-Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Respondent, Boston and Maine Corporation ("B&M"), operates a railroad in the Northeastern United States. The present controversy centers around the lease of

track by B&M to the New England Southern Railroad Co., Inc. ("NES").

A. Proceedings Before the ICC

In order to effectuate this transaction, B&M and NES filed, on January 29, 1985, a Joint Petition with the Interstate Commerce Commission (the "ICC") seeking exemptions of the lease under the Interstate Commerce Act ("ICA") at 49 U.S.C. §10505. Before exempting a lease transaction from regulation, the ICC is required to determine that: (1) regulation is not necessary to carry out federal rail transportation policy and (2) either (a) the matters are of limited scope or (b) regulation is not necessary to prevent abuses of market power. 49 U.S.C. §10505(a). The ICC made favorable determinations on all these points and concluded that granting B&M and NES's Joint Petition would promote rail transportation policy:

> Granting the exemption will minimize regulation, expedite decisions where regulation is not necessary, and reduce regulatory barriers to entry. Further, there will not be any abuse of market power, since there will not be any change in the number of competitive alternatives available to shippers or any change in the quality of service. There will be only a substitution of one carrier for another, with the new carrier operating under the standards of the previous carrier. Finally, the proposal is of limited scope, involving only 27 miles of line, 27 customers, and 2,000 carloads of traffic per year.

ICC Decision, Cross-Petitioner's Appendix at 6a-7a.

In the Joint Petition, B&M and NES made clear that NES would be responsible for all train operations on the

leased track. As the ICC noted in its Decision, the Brotherhood of Locomotive Engineers ("BLE"), the United Transportation Union[1] and the Railway Labor Executives' Association[2] all sought to have the ICC impose labor protection provisions ("LPP's") to protect B&M employees adversely affected by the lease. Cross Petitioner's Appendix at 3a-4a, 7a.

In its Decision dated April 26, 1986, the ICC concluded that LPP's should be imposed. In accordance with its long standing policy in lease cases, the ICC imposed the LPP's as described in *Mendocino Coast Railway, Inc.—Lease and Operate—California Western Railroad*, 360 I.C.C. 653 (1980), *aff'd. sub nom. Railway Labor Executives' Association v. United States*, 675 F.2d 1248 (D.C. Cir. 1982).

On July 14, 1985, the lease between B&M and NES was implemented at which time, *inter alia*, the Concord switcher assignment was abolished, the regularly assigned A and B unit coal train crew positions were abolished and the EDCO/COED (East Deerfield to Concord/Concord to East Deerfield) train was changed to EDMA/MAED (East Deerfield to Manchester/Manchester to East Deerfield).

B. Proceedings Below

In response to the implementation of this lease, the BLE, on July 18, 1985, filed with the District Court a Verified Complaint for Declaratory and Injunctive Relief,

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[1]The United Transportation Union ("UTU") is a union representing other employees of the B&M. The UTU is not involved in this action.

[2]The Railway Labor Executives' Association is an unincorporated, voluntary association of the chief executive officers of numerous labor organizations which collectively represent substantially all of this nation's railroad employees.

a Motion for Temporary Restraining Order and a Motion for Preliminary Injunction. On July 19, 1985, the Honorable Judge Mazzone, sitting as an Emergency Judge, denied the BLE's Motion for Temporary Restraining Order.

On August 1, 1985, the District Court, by the Honorable Judge Keeton, heard oral argument on the BLE's Motion for Preliminary Injunction. In this injunction action, the BLE was seeking to reverse the changes which had taken place as a result of the ICC-exempted lease transaction. The BLE alleged that B&M had violated the Railway Labor Act, 45 U.S.C. §§151 *et seq.* ("RLA") by unilaterally changing the rates of pay, rules and working conditions of BLE members and, therefore, the BLE was entitled to a *status quo* injunction to enforce the obligations set forth in Section 6 of the RLA, 45 U.S.C. §156. B&M argued, *inter alia*, that the District Court did not have jurisdiction since the Complaint constituted a collateral attack on an Order of the ICC.

On October 4, 1985, the District Court dismissed the BLE's Complaint in its entirety for want of subject matter jurisdiction. The Court reasoned that it did not have jurisdiction to issue a preliminary injunction since the disputes presented were not "major" disputes subject to §6 of the RLA. In so holding, the District Court did not adopt the reasoning urged by B&M. Rather, the Court held that the disputes were "minor" under the RLA and, therefore, that the proper forum for resolution was arbitration before the National Railroad Adjustment Board pursuant to §4 of the RLA, 45 U.S.C. §154.

On appeal, the First Circuit affirmed the result of the District Court holding that the unit coal train controversy represented a "minor" dispute over which the District Court lacked jurisdiction. In regard to the abolishment of

the Concord switcher and the change in the EDCO/COED train to EDMA/MAED, the Court of Appeals held that these disputes were "major". The Court of Appeals, however, affirmed the District Court's decision on the basis that the relief requested by the BLE was, in essence, a collateral attack on an ICC order.

REASONS FOR DENYING THE WRIT

The Court of Appeals fully considered and correctly decided the issues raised below. None of the arguments raised by the BLE in support of its Petition for Certiorari warrant granting the Petition.

I. THE COURT OF APPEALS' HOLDING THAT THE BLE'S ACTION WAS A COLLATERAL ATTACK ON AN ORDER OF THE ICC DOES NOT WARRANT REVIEW BY THIS COURT

A. The Court of Appeals' Decision is Not in Conflict with the District of Columbia Circuit Court of Appeals' Decision in *Brotherhood of Locomotive Engineers v. Interstate Commerce Commission*

The Brotherhood of Locomotive Engineers argues that the Court of Appeals' decision is in conflict with the District of Columbia Circuit Court of Appeals' decision in *Brotherhood of Locomotive Engineers v. Interstate Commerce Commission*, 761 F.2d 714 (D.C. Cir. 1985), *cert. granted*, 54 U.S.L.W. 3630 (U.S., March 25, 1986) (Nos. 85-792 and 85-793) *("BLE v. ICC")*. This case, however, involves an entirely different issue.

The issue in *BLE v. ICC* now pending before this Court is whether the Interstate Commerce Commission

("ICC"), when approving a transaction pursuant to 49 U.S.C. §§11343 and 11344, is required to make specific findings of necessity pursuant to 49 U.S.C. §11341(a) in order to exempt carriers participating in the approved transaction from the requirements of the Railway Labor Act.

The District of Columbia Circuit Court of Appeals held that the ICC was not empowered to rely mechanically on its approval of the underlying transaction as justification for the denial of RLA rights to the union, but must explain why termination of the asserted rights is necessary to effectuate the purpose of the ICC-approved transaction. 761 F.2d at 725.

Not only is this not the issue involved in the present action, it could not be involved. *BLE v. ICC* was an action to modify an order of the ICC pursuant to 28 U.S.C. §§2321 and 2342 which was, and which *must* be, brought in a Court of Appeals. As the First Circuit stated: "Had [the BLE] wished to challenge the ICC Order as an improper exercise of the ICC's authority, it needed to challenge the order in a suit brought directly to the court of appeals." Petitioner's Appendix at 14a. Thus, the fact that *BLE v. ICC* is pending before this Court is not grounds for granting the Petition.

B. A Separate, Independent Ground Supports the Court of Appeals' Decision

The BLE argues that the Court of Appeals rested its conclusion that the BLE's action was a collateral attack on an ICC Order on the ground that 49 U.S.C. §11341(a) exempted B&M from its bargaining obligations under the RLA. Respondent disagrees that this was the exclusive ground for the Court of Appeals' decision and asserts that

a separate, independent ground supports the Court of Appeals' decision. The finding of the Court of Appeals that the BLE's action is an impermissible collateral attack on an Order of the ICC is supported by the indisputable fact that the District Court could not have granted any relief in this action which would not have had the impermissible effect of reversing or modifying an Order of the ICC.

Although styled as an action under the RLA, the Complaint requested the District Court to enter injunctive relief which, if granted, would necessarily have reversed or modified an ICC order. The BLE asked the District Court to require B&M to resume operations on track leased to NES and to reinstate employment positions abolished as a result of the transaction. Implicitly, but necessarily, the BLE also asked the District Court to require NES to abolish jobs created to fulfill obligations under the lease, to cancel or freeze obligations entered into for capital acquisitions and to halt business development activities which were promising and which could be irreparably harmed by uncertainty over NES's right to operate on the leased track. J.A.[3] at 167-68. These are all matters presented to the ICC in the course of the exemption proceeding. The ICC's Decision anticipated and authorized these activities. Cross-Petitioner's Appendix at 2a-3a.

A district court's jurisdiction is limited to *enforcing* ICC orders. 28 U.S.C. §1136(a). Attempts to change ICC orders must be addressed either to a Court of Appeals on a petition for review under 28 U.S.C. §2344, or to the ICC under its primary jurisdiction to resolve matters of national transportation policy. *ICC v. Atlantic Coast Line Railroad*, 383 U.S. 576, 579 (1966).

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[3]References to "J.A." are to the Joint Appendix in the Court of Appeals.

The primary jurisdiction doctrine "requires initial submission to the [Interstate Commerce] Commission of questions that raise issues of transportation policy which ought to be considered by the [Interstate Commerce] Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by [the Interstate Commerce] Act." *ICC v. Atlantic Coast Line Railroad*, 383 U.S. at 579, *quoting United States v. Western Pacific Railroad*, 352 U.S. 59, 65 (1956). The ICC's primary jurisdiction embraces initial consideration of matters of national transportation policy and subsequent determinations of the scope and meaning of its orders. *Southern Railway Co. v. United States*, 412 F.Supp. 1122, 1151 (D.C.D.C. 1976) (three-judge panel).

The BLE argued below that its action under the RLA is not a collateral attack on an ICC Order because relief allegedly could be fashioned in the present situation by allowing the lease transaction to remain consummated, while requiring the carrier to continue to pay affected employees as though the transaction had not been implemented.

The Court of Appeals properly held that any injunction preserving the *status quo* under the RLA, 45 U.S.C. §156, would overturn the ICC Order and, therefore, would be an impermissible collateral attack on an ICC Order. The reasoning supporting this result is unassailable. First, the District Court's authority to enforce obligations under Section 6 of the RLA is limited to issuing injunctions to preserve the *status quo*. Prior to July 15, 1985, the *status quo* was that certain employees worked certain routes in return for specified compensation. An injunction which requires payment of the specified compensation without necessity of working preserves only one half of the *status*

quo. Either the Court may preserve the *status quo* or it may not; no court has authorized preserving selected portions of the *status quo*.

Second, an injunction ordering that employees be compensated as though B&M continued to operate trains on leased track runs head-on into the ICC-imposed requirements under *Mendocino Coast* that employees dismissed or displaced as a result of the lease be paid allowances preserving their earnings as measured during the previous year. If the injunction purports to supercede *Mendocino Coast*, then it is in direct conflict with the ICC Decision; if the injunction does not purport to supercede *Mendocino Coast*, then it may interfere with the dismissal and displacement allowances B&M must make under *Mendocino Coast* to adversely affected employees.

Third, an injunction ordering that employees be compensated as though B&M continued to operate trains on leased track would interfere with the purpose, and intended benefits, of the ICC Decision. B&M and NES bargained at arm's length over the lease, and each side anticipated that it would realize various benefits. An injunction which would deprive B&M of the benefit of the ICC Order is surely the functional equivalent of a judicial order "to enjoin, set aside [or] suspend (in whole or in part) . . . final orders of the Interstate Commerce Commission." 28 U.S.C. §2342.

Fourth, the BLE's position is that B&M must negotiate with it before it is permitted to abolish positions, change routes, or otherwise alter working conditions resulting from implementation of the ICC exempted lease. The BLE requested issuance of a *status quo* injunction pursuant to Section 6 of the RLA which was designed to

prevent changes in working conditions until the negotiations procedure is exhausted. However, any injunction which might be issued pursuant to Section 6 would be in direct conflict with that portion of *Mendocino Coast* which expressly authorizes the transaction to be implemented before negotiations with the union have resulted in an agreement. *Mendocino Coast,* art. I, ¶4.

In short, the relief which the BLE sought would have undone the lease which had already been implemented pursuant to authorization of the ICC. Even injunctive relief which stops short of requiring B&M to violate its lease represents a conflict with, or modification of, the ICC Decision. Clearly, then, this was an action "to enjoin, set aside, [or] suspend (in whole or in part)" a Decision of the ICC and, therefore, the Court of Appeals correctly held that the action was, in essence, an impermissible collateral attack on an Order of the ICC.

The Court of Appeals for the Second Circuit reached a similar result in *Railway Labor Executives' Association v. Staten Island Railroad Corporation*, 122 LRRM 2939 (2nd Cir., 1986). *Staten Island* involved an action by the Railway Labor Executives' Association ("RLEA") to obtain a *status quo* injunction under the RLA. Staten Island planned to abandon its entire line and trackage rights in accordance with the applicable provisions of the ICA. The ICC conditioned its approval of Staten Island's abandonment upon compliance with the labor protection provisions set forth in *Oregon Short Line R.R.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). Prior to actual abandonment, New York Susquehanna and Western Railway filed an offer to purchase Staten Island and negotiated a deal which required, *inter alia*, that the abandonment

petition be dismissed along with the labor protection provisions imposed. The ICC approved the transaction, dismissed Staten Island's abandonment application and did not impose labor protection provisions. In affirming the dismissal by the District Court, the Second Circuit held that the RLEA's action was an impermissible collateral attack on an ICC Order since "[u]nder no circumstances could [the relief sought] be granted without rescission or modification of the ICC's order." *Id.* at 2942-43.

C. The Court of Appeals' Decision is not in Conflict with this Court's Decisions in *Detroit & Toledo Shore Line and Order of Railroad Telegraphers*

The BLE argues that certiorari should be granted because the Court of Appeals' decision conflicts with this Court's decisions in *Detroit & Toledo Shore Line R. Co. v. Brotherhood of Locomotive Firemen & Enginemen*, 396 U.S. 142 (1969) and *Order of Railroad Telegraphers v. Chicago & North Western R. Co.*, 362 U.S. 330 (1960) by impermissibly and seriously intruding on an area regulated by the Railway Labor Act, thereby undermining the policy furthering collective bargaining. These cases, however, are totally inapplicable to the situation involved here.

Neither *Detroit & Toledo Shore Line* nor *Order of Railroad Telegraphers* involved an ICC-approved or exempted transaction. The issue before this Court in *Detroit & Toledo Shore Line* was whether the terms and conditions of employment which must be maintained under the RLA *status quo* requirements could include working conditions not set forth in a written agreement. *Id.* at 143. Similarly, *Order of Railroad Telegraphers* does not involve an ICC-approved or exempted transaction. The issue before the Court was whether the District Court

had jurisdiction to enjoin a strike by the union caused by the carrier's refusal to bargain. The effect of ICC approval or exemption of a transaction upon a union's rights under the RLA was not addressed by the Court in either case.

D. The Court of Appeals' Decision Does Not Contravene the Legislative Intent in Enacting 49 U.S.C. §10505

The BLE argues that this Court should grant the Petition because the Court of Appeals' decision has disregarded the legislative history of 49 U.S.C. §§10505 and 11347. Contrary to the BLE's assertion, the legislative intent of these sections has not been disregarded, but has, in fact, been followed by the Court of Appeals. Under the supervision of the ICC and in accordance with the intent of Congress, railroads are engaged in the process of restructuring and adjusting the nation's rail transportation system. The purpose of this restructuring is to permit railroads to adapt to a deregulated economic environment in which they must compete with other forms of transportation. *LaMoille Valley R.R. v. Interstate Commerce Commission*, 711 F.2d 295, 301-02 (D.C. Cir. 1983).

This restructuring comports with the Congressional intent articulated in the Staggers Rail Act of 1980 ("Staggers Act") 94 Stat. 1895. In §3 of the Staggers Act, Congress explains that:

> The purpose of this Act is to provide for the restoration, maintenance, and improvement of the physical facilities and financial stability of the rail system of the United States. In order to achieve this purpose, it is hereby declared that the goals of this Act are—

> (1) to assist the railroads of the Nation in rehabilitating the rail system in order to meet the demands of interstate commerce and the national defense;
>
> (2) to reform Federal regulatory policy so as to preserve a safe, adequate, economical, efficient, and financially stable rail system;
>
> (3) to assist the rail system to remain viable in the private sector of the economy;
>
> (4) to provide a regulatory process that balances the needs of carriers, shippers, and the public; and
>
> (5) to assist in the rehabilitation and financing of the rail system.

To accomplish these goals, Congress made two important changes. First, Congress provided methods allowing the ICC to process petitions involving small transactions more quickly than under present law and second, Congress reduced the number of factors the ICC must consider in ruling on transactions less sweeping than mergers.

In enacting §10505 of the ICA, Congress still recognized the importance of protecting the interests of labor and required that labor protection provisions be applied in an exempted transaction. Such LPP's provide substantial benefits and bargaining rights to labor while providing for prompt implementation of the transaction. It is clear that ICC-imposed labor protection provisions have been viewed as the *quid pro quo* for implementing an ICC exempted or approved transaction. Labor gets the benefits provided and, in return, the carrier is permitted to implement the transaction without regard to the current working agreement or the RLA, but with the obligation to bargain

with the union in accordance with ICC-imposed conditions and schedules.

If, as the BLE argues, the RLA procedures are applicable to the implementation of this transaction, the Congressional intent favoring the implementation of these transactions can be easily frustrated. As the Eighth Circuit stated in *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry. Co.*, 314 F.2d 424 (8th Cir.) *cert. denied*, 375 U.S. 819 (1963):

> [T]he ICC power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist .... Under the Railway Labor Act in a major dispute employees cannot be compelled to accept or arbitrate new working rules or conditions .... Thus, under the Railway Labor Act provisions, it is possible for either party to completely block any change in working conditions by refusing to agree to a change and by refusing to arbitrate .... [I]f it [the RLA] applied, [it] would threaten to prevent many consolidations.

Id. at 430-31.

It is not difficult to see what the BLE and other labor organizations seek by attempting to invoke the dispute resolution procedures of the RLA. They do not seek protection from, and the ability to bargain over, changes in the terms of employment caused by the exempted transaction. *Mendocino Coast* already grants them those rights. What, in fact, they seek is the right to exercise the power of veto over implementation of an ICC-approved or exempted lease transaction *i.e.*, they seek a veto over the railroad industry's ability to adapt to today's economic and regulatory environment. This result would be clearly in conflict

with the intent of Congress. The BLE is not entitled to a grant of its Petition to make such an argument.

II. THE COURT OF APPEALS' HOLDING THAT THE UNIT COAL TRAIN CONTROVERSY WAS A MINOR DISPUTE DOES NOT WARRANT REVIEW BY THIS COURT

A. The Court of Appeals' Decision is Not in Conflict with this Court's Decision in *Detroit & Toledo Shore Line*

The BLE argues that this Court should grant certiorari because that portion of the Court of Appeals' decision holding the unit coal train dispute to be minor is in conflict with *Detroit & Toledo Shore Line.*

Detroit & Toledo Shore Line is distinguishable upon its facts and the issue it addressed. The issue before this Court in *Detroit & Toledo Shore Line* was whether the terms and conditions of employment which must be maintained under the RLA *status quo* requirements included working conditions not set forth in the written agreement. *Id.* at 143. The carrier in *Detroit & Toledo Shore Line* did not claim that either the express written contract or objective working conditions supported the position taken by the carrier.

By contrast, B&M pointed to the express language of the Unit Coal Train Agreement in support of its argument that the agreement was applicable only to the "operation of special Unit Coal Trains between Mechanicville, New York and Concord, New Hampshire." J.A. at 24. On this basis, *Detroit & Toledo Shore Line* is clearly distinguishable from the present situation.

Thus, the issue before the Court of Appeals was the application of its "obviously insubstantial" standard as set forth in *Airline Stewards & Stewardesses Association v. Caribbean Atlantic Airlines, Inc.*, 412 F.2d 289 (1st Cir. 1969). To determine if a dispute is major or minor the First Circuit focuses on:

> whether the company's contractual defense was so obviously insubstantial as to be an attempt to circumvent §6 of the Railway Labor Act.
>
> * * *
>
> It may be that the District Court's interpretation of the contract will ultimately prove to be correct. But in deciding whether to assume jurisdiction to grant injunctive relief, the court's task is not to interpret the contract. It is to determine whether the contractual defense is frivolous. Otherwise the arbitration machinery mandated by the Railway Labor Act will be dealt a crippling blow.

Id. at 291.

In applying this test to the particular facts involved in this situation, the Court of Appeals found that it was not frivolous for B&M to argue that the Unit Coal Train Agreement did not cover trains going only from Mechanicville to Bow and, therefore, the dispute was minor. Consistent with its earlier decisions, the Court of Appeals held that the merits of the dispute over application of the Unit Coal Train Agreement was a matter for arbitration.

B. The Court of Appeals Correctly Applied the "Obviously Insubstantial" Standard

Finally, the BLE argues that this Court should grant certiorari because the Court of Appeals erred in its application of the "obviously insubstantial" standard. The BLE

argues that, because B&M has complied with the Unit Coal Train Agreement in past instances when the train went from Mechanicville to Bow, notwithstanding the express language of the contract, the objective working conditions included this condition.

In *Airline Stewards*, the First Circuit rejected a similar argument. In reversing the District Court's finding of a major dispute, the Court stated:

> Based on the literal language of paragraph 4.G. the company's argument is not without merit. But the district court looked to past practice in holding that there has been a radical departure from the contract. Assuming the district court's description of past practice to be accurate, [reference omitted] it is nevertheless not conclusive. Past practice may well be persuasive evidence of the meaning of contract terms but so may be the plural reference to "flights". This confrontation between words and practice poses a run-of-the-mill problem of interpretation of the type commonly presented to arbitrators.

Id. at 291.

As is apparent from this quotation, the First Circuit has consistently held that any conflict between the express language of an agreement and the practice of the parties presents a minor dispute appropriate for resolution before an arbitrator. Thus, the Court of Appeals' decision follows an unbroken line of authority in the First Circuit interpreting the "obviously insubstantial" standard.

Furthermore, since the BLE is only challenging the application of the legal standard to the unique facts of this case, it is clear that the situation presented before this Court would be resolved not upon legal issues of national

importance, but upon factual considerations related only to these specific circumstances. Thus, the granting of the Petition is not warranted in this case.

CONCLUSION

For all the foregoing reasons, Respondent, Boston and Maine Corporation, respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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